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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re YELLOW CAB COOPERATIVES, INC., aka All Taxi Electronics, Debtor.	Case No. 16-30063 DM Chapter 11 Date: April 7, 2017 Time: 10:00 a.m. Place: Courtroom 17 450 Golden Gate Avenue San Francisco, California

MOTION FOR ORDER AUTHORIZING TRUSTEE TO SELL SUBSTANTIALLY ALL OPERATING ASSETS OF DEBTOR FREE AND CLEAR OF LIENS AND RELATED RELIEF; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Proposed Purchaser: Big Dog City Corporation, or an overbidder

Potentially Affected Lienholders: Wells Fargo Financial Leasing, Inc.

Parties to Executory Contracts and Leases: See Exhibit A to separately submitted Motion for Order Authorizing Trustee to Assume and Assign Executory Contracts and Leases in Connection with Proposed Sale of Assets (the "Assignment Motion")

I. INTRODUCTION AND SUMMARY OF REQUESTED RELIEF

Randy Sugarman (the "Trustee"), the Chapter 11 Trustee of the Bankruptcy Estate of Yellow Cab Cooperative, Inc., the debtor in the above-captioned Chapter 11 case (the "Debtor"), submits this motion (the "Motion"), pursuant to Bankruptcy Code Sections 105 and 363(b) and (f) (11 U.S.C. §§105, 363(b) & (f)), for an order authorizing the Trustee to sell substantially all of the estate's operating assets to Big Dog City Corporation ("Buyer") or to an overbidder at the conclusion of a hearing on this Motion (the "Sale Motion"), free and clear of the liens, claims and interests identified. The Motion is supported by the declaration of Randy Sugarman filed concurrently and such other evidence and argument as may be presented to the Court prior to its ruling on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Jurisdiction

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested herein are Sections 105(a) and 363(b) and (f) of Title 11 of the United States Code (the "Bankruptcy Code").

B. Factual Background

5. On January 22, 2016 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code commencing this case.

6. The Debtor then operated its businesses and managed its properties as a debtor-in-possession.

7. On February 3, 2016, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee").

8. The Committee filed a motion for appointment of a Chapter 11 Trustee on September 23, 2016 (the "Trustee Appointment Motion").

9. The Debtor attempted to sell substantially all of its assets to Buyer pursuant to that certain Asset Purchase Agreement dated October 18, 2016 and its motion to approve such sale and agreement filed on October 20, 2016 ("Debtor's Sale Motion").

10. The Committee opposed Debtor's Sale Motion.

11. On November 15, 2016, this Court denied Debtor's Sale Motion and approved the Trustee Appointment Motion.

12. This Court entered its order appointing the Trustee on November 22, 2016, and since such date, the Trustee has operated the business of the Debtor and managed the Debtor's properties pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

13. The Trustee has been exploring the sale of the Debtor's assets since his appointment, and Buyer again proposed to purchase substantially all the Debtor's operating assets and to assume certain liabilities (the "Sale").

14. Following initial discussions, Buyer and the Trustee negotiated the purchase price and other key terms embodied in an Asset Purchase Agreement (the "APA"). A true and correct copy of the APA is attached to Sugarman Decl. as Exhibit A.[1]

15. The APA requires that Buyer pay $400,000 in cash for the assets being purchased (the "Assets"), as well as assume certain liabilities (the "Assumed Liabilities") with respect to specified executory contracts and unexpired leases to be assumed and assigned by the Trustee to Buyer (the "Designated Executory Contracts and Unexpired Leases").[2]

16. The Assets include substantially all of the Debtor's operational assets, but the sale specifically excludes, among other things: (a) the Debtor's corporate and financial books and records; (b) the Debtor's utility and other deposits, prepaid amounts, cash on hand and in bank or similar accounts; (c) avoidance claims and causes of action of the bankruptcy estate arising under 11 U.S.C. §544 through §552; (d) the Debtor's insurance policies and related rights; (e) the Debtor's accounts receivable and similar rights; and (f) the Debtor's employee benefits and related rights. Further, the APA provides that Buyer will not purchase any vehicles subject to a security interest in favor of Ford Motor Credit Company.

17. The APA also specifically excludes the assignment of the Debtor's lease for its primary business premises located at 1200 Mississippi Street, San Francisco, California. However, the APA provides that Buyer and the Trustee shall negotiate and enter into a

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[1] Capitalized terms not defined herein have the meaning ascribed to them in the APA. The following is intended to summarize key terms of the APA. In the event of any conflict between the APA and the description in this Motion, the specific provisions of the APA shall govern.

[2] The Trustee's proposed assumption and assignment of the Designated Executory Contracts and Unexpired Leases is the subject of his concurrently filed Assignment Motion.

mutually acceptable sublease with the following terms: a term of six (6) months from the Closing Date; either party may terminate the sublease on 60 days' notice to the other party; and the applicable rent and any other charges due under such sublease shall be paid by Buyer in an amount equal to the sums due under the 1200 Mississippi Lease.

18. The sale of the Assets will be free and clear of applicable liens, claims, encumbrances and other interests to the fullest extent allowed by law except as expressly provided in the APA.

19. Pursuant to the APA, for the Buyer to consummate the Sale, the order(s) approving the Sale and related transactions must:

(i) approve, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code: (A) the execution, delivery and performance by the Trustee of the APA; (B) the sale of the Assets to Buyer on the specified terms, including that such sale is free and clear of applicable Encumbrances and claims (except with respect to the Assumed Liabilities), with such Encumbrances and claims to attach only to the proceeds of the sale; and (C) the performance by the Trustee of his obligations under the APA;

(ii) authorize and direct the Trustee to assume and assign to Buyer the Designated Executory Contracts and Leases pursuant to Section 365 of the Bankruptcy Code;

(iii) find that Buyer is a "good faith" purchaser within the meaning of Section 363(m) of the Bankruptcy Code and that the Buyer is entitled to have the protections afforded by that section;

(iv) find that reasonable and adequate notice of the sale and transfer of the Assets to Buyer, and assumption and assignment of the Designated Executory Contracts and Leases to the Buyer, has been provided to all parties required to be given notice under the Federal Rules of Bankruptcy Procedure ("FRBP") and the Local Bankruptcy Rules for the Northern District of California;

(v) find that neither the Trustee nor Buyer has engaged in any conduct that would cause or permit the sale of the Assets to be avoided under Section 363(n) of the Bankruptcy Code;

(vi) bar any third parties from asserting claims (including any claims for successor liability, including claims arising from unassumed unexpired leases or executory contracts), Liens or Encumbrances against Buyer or the Assets that arose prior to closing of the Sale ("Closing") other than the Assumed Liabilities;

(vii) approve bidding procedures; and

(viii) provide that the Sale Order is binding on any and all successors and assigns.

III. DISCUSSION

A. The Trustee May Sell the Debtor's Assets With Court Approval

Section 363(b) of the Bankruptcy Code permits a trustee to sell assets other than in the ordinary course of business after notice and a hearing. *In re Qintex Entertainment, Inc.*, 950 F.2d 1492, 1495 (9th Cir. 1991). In accordance with FRBP 6004, sales outside the ordinary course of business may be by private sale or public auction. One business justification in any sale is the ultimate purpose of obtaining the highest price for the property sold. *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). "In approving any sale outside the ordinary course of business, the court must not only articulate a sufficient business reason for the sale, it must further find it is in the best interest of the estate, *i.e.*, it is fair and reasonable, it has been given adequate marketing, that it has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith and that it is an arms-length transaction. *Id.*

In performing his duties, the Trustee has concluded that the ultimate cost to the estate to modernize the aging taxi fleet, change the driver culture to a customer oriented one, reduce the number of accidents per week and resolve the workers compensation costs would far exceed $1,000,000 and would take many months to achieve, with no assurance of success. Further, while the Debtor's operations could and should be reorganized, the Trustee believes that the reorganization and the recapitalization of the company should be accomplished by a buyer.

The Trustee has spoken with various potential buyers, including one in Paris and another in Singapore. He also has spoken with the Committee's financial advisor, Development Specialists, Inc., about the extent of its marketing efforts. The Trustee has concluded that the proposed transaction with the Buyer is in the best interest of the estate and its creditors and a valid exercise of the Trustee's business judgment and authority over the Debtor's bankruptcy estate, subject to approval of the Bankruptcy Court.

Courts have established that a trustee may enter into transactions outside the ordinary course of business in his reasonable business judgment. *See generally* 3 *Collier on Bankruptcy* ¶362.02[4] (16th ed. 2013) at p. 363-18—363-19. And courts afford broad deference to the trustee's reasonable business judgment. *Bennett v. Williams*, 892 F.2d. 822, 824 (9th Cir. 1989) ("... we are deferential to the business management decisions of a bankruptcy trustee . . .").

B. Bid Procedures and Court Supervised Auction

To maximize the value of the Assets for the benefit of the estate and its creditors, the

Trustee proposes to accept overbids at an auction (the "Auction") conducted by the Court (as provided in the APA) at the hearing on the Motion, subject to the bidding procedures set forth on Exhibit A to this Motion (the "Bid Procedures").

C. Free And Clear Sale

Bankruptcy Code Section 363(f) provides that a trustee may sell property pursuant to Section 363(b) or (c) free and clear of any interest in such property of an entity other than the estate, only if:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

The Buyer seeks to purchase the estate's VCX 3COMM Phone System, which is the subject of a lien by Wells Fargo Financial Leasing, Inc. According to the Trustee's investigation, the Debtor has paid that lien in full. The lien is therefore the subject of a bona fide dispute. Pursuant to 11 U.S.C. § 363(f)(4), the Trustee seeks an order authorizing him to transfer such assets free and clear of such lien, which lien, if any, shall attach to the proceeds of sale to the same extent and with the same force, effect, validity and priority, if any, as it attached to the Assets.

To the extent any counterparty to any executory contract or unexpired lease to be assigned to Buyer under the APA contends that its agreement with the Debtor is in fact a perfected disguised security agreement and not an executory contract or lease, and if the Buyer (or a successful overbidder) seeks for the Trustee to assume and assign that lease or contract, then the Trustee shall either (a) obtain the consent of the counterparty to assume and assign the subject lease or contract, or (b) pay the counterparty in full for the value of its security interest out of the sale proceeds. Accordingly, the Trustee submits that the provisions of Bankruptcy Code Section 363(f)(2) and/or (3) are satisfied to permit the Trustee to sell free and clear of such potential lien or interest.

D. Request For Good Faith Finding

Bankruptcy Code Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Although the Bankruptcy Code does not define "good faith," courts have found it to be the absence of fraud or collusion between bidders. *In re Abbotts Dairies*, 788 F.2d 143, 147-148 (3rd Cir. 1986). It is typically only "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders" that leads to a determination that sale proceeding lacks good faith. *In re M Capital Corporation*, 290 B.R. 743, 748 fn. 3, (B.A.P. 9th Cir. 2003) (quoting *In re Suchy*, 786 F.2d 900, 902 (9th Cir. 1985)).

As reflected in the Declaration of Randy Sugarman, the proposed sale to the Buyer or its assignee has been negotiated at arm's length. Neither the Buyer nor any of its principals are insiders or affiliates of the Trustee or the Debtor. Buyer has not entered into any agreement to employ existing employees of the Debtor, although it is contemplated under the APA that employment offers will be extended to certain workers since it is the Buyer's intention to continue the operations of the Debtor as a taxicab company on a going concern basis following the Closing. The Buyer has been represented by its own attorney who has assisted the Buyer in negotiating the APA. There are no other agreements, arrangements, or understandings between the Buyer and the Trustee except as disclosed herein. The Buyer has not engaged in any fraudulent or collusive behavior in its efforts to acquire the assets of the Debtor. The Buyer has the financial wherewithal to consummate the proposed transactions, including the ability to perform under the Designated Executory Contracts and Unexpired Leases upon their assumption and assignment to the Buyer. Accordingly, the Trustee requests that the Court find the sale to the Buyer to be in good faith pursuant to Bankruptcy Code Section 363(m), and not controlled by any agreement among any potential bidders pursuant to Bankruptcy Code Section 363(n).

E. Waiver of FRBP 6004(h) Is Appropriate

The Trustee requests that the stay imposed by FRBP 6004(h) be waived. It is in the interest of the estate and its creditors that the sale be consummated as quickly as possible without any stay pending a possible appeal. The Trustee is aware of no prejudice that will result from waiver of the fourteen (14) day stay.

IV. CONCLUSION

The Trustee believes that the proposed sale and auction are fair, reasonable, and are appropriately structured to ensure that the Trustee will obtain the best price for the Assets. The Trustee submits that the Bid Procedures serve to maximize the value of the Assets while also ensuring that (a) only legitimate overbids are received; and (b) any overbid is sufficient to cover the Expense Reimbursement (defined in the Bid Procedures) required to be paid to Buyer if an overbid is accepted and the sale consummated. The Trustee further believes, in his business judgment, that the proposed sale, subject to overbid, is in the best interests of the estate and creditors because it will maximize the value of the Debtor's assets.

WHEREFORE, the Trustee respectfully requests that the Court enter its order as follows:

A. Granting the Motion;

B. Approving the Trustee's sale of the Assets, subject to the Bid Procedures, at the conclusion of the hearing on this Motion, to the Buyer or such higher and better bidder approved by the Court, and that such sale shall be binding on any and all successors and assigns, including any trustee appointed after entry of the Sale Order pursuant to Sections 701 or 702 of the Bankruptcy Code;

C. Approving, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code: (i) the execution, delivery and performance by the Trustee of the APA (or similar agreement with a successful overbidder); (ii) the sale of the Assets to Buyer (or successful overbidder) on the terms specified in the APA and discussed above, including that such sale is free and clear of any applicable Encumbrances and claims (except with respect to the Assumed Liabilities), with such Encumbrances and claims to attach only to the proceeds of the sale; and (iii) the performance by the Trustee of its obligations under the APA;

D. Finding that notice of the hearing on this Motion and the related Assignment

Motion was adequate under the circumstances;

E. Finding that neither the Trustee nor Buyer has engaged in any conduct that would cause or permit the sale of the Assets to be avoided under Section 363(n) of the Bankruptcy Code;

F. Providing that any third parties are barred from asserting claims (including any claims for successor liability, including claims arising from unassumed unexpired leases or executory contracts), Liens or Encumbrances of any kind or nature against Buyer or the Assets that arose prior to Closing except pursuant to Assumed Liabilities under the APA;

G. If the highest bidder fails to close, approving the sale to any back-up bidder who so elects to complete the sale at the last bid made by such back-up bidder;

H. Authorizing the Trustee to pay the Expense Reimbursement to the Buyer in the event the Trustee closes a transaction with another purchaser approved by the Court;

I. Authorizing the Trustee to refund any Good Faith Deposits pursuant to the terms of the APA to any unsuccessful bidders;

J. Finding the proposed sale to be in good faith and in the best interest of creditors pursuant to BankruptcyCode Section 363(m);

K. Approving the sale free and clear of any applicable Liens and Encumbrances;

L. Waiving the stay of FRBP 6004(h) so that the transaction can close immediately upon entry of an order approving the proposed transaction; and

M. For such other and further relief as the Court deems just and proper.

DATED: March 17, 2017

MICHELSON LAW GROUP

By: *\/ s / Randy Michelson*
Randy Michelson
Attorneys for Chapter 11 Trustee
Randy Sugarman

EXHIBIT A

Bid Procedures

(1) **Qualification as Bidder**: Any person or entity that wishes to participate in the bidding process for the Assets (each, a "Potential Bidder") must first become a "Qualifying Bidder." Parties may be qualified as a Qualifying Bidder up to the Bid Deadline (i.e., April 3, 2017 at 5:00 p.m. (PT)), but parties interested in submitting a bid for any of the Assets are encouraged to qualify as soon as possible. To be deemed a Qualifying Bidder, such party must provide sufficient information as determined by the Trustee, to allow the Trustee to determine that the interested party has the financial wherewithal to close a sale transaction and to provide adequate assurance of future performance as required under Section 365 of the Bankruptcy Code. Each Potential Bidder shall comply with all reasonable requests for information and due diligence access by the Trustee regarding the ability of such Potential Bidder to consummate its contemplated transaction. Once qualified, Qualifying Bidders will be able to conduct limited due diligence concerning the Assets. Notwithstanding anything to the contrary in the Bid Procedures, and for the avoidance of doubt, for all purposes under the Bid Procedures: (i) the Buyer shall be considered a Qualifying Bidder, and the APA shall be considered a Qualifying Bid (as defined below); and (ii) in determining whether the Potential Bidders constitute Qualifying Bidders, the Trustee may consider a combination of bids for the Assets.

(2) **Due Diligence**: The Trustee will provide any Qualifying Bidder with reasonable access to due diligence information that the Trustee believes to be reasonable and appropriate under the circumstances. The due diligence period shall extend through and including the Final Bid Deadline. The Trustee may, but shall not be obligated to, in his sole discretion, furnish any due diligence information after the Final Bid Deadline. The Trustee reserves the right, in his sole discretion, to withhold or limit access to any due diligence information that the Trustee determines is business-sensitive or otherwise not appropriate for disclosure to a Qualifying Bidder. Notwithstanding any limitations provided for in such information, including, without limitation, any non-disclosure, confidentiality or similar provisions, the Trustee shall be authorized to provide due diligence information to the Qualifying Bidders, provided that such Qualifying Bidders have delivered an executed confidentiality agreement in form and substance acceptable to the Trustee. The Trustee is not responsible for, and shall have no liability with respect to, any information obtained by, or provided to, any Qualifying Bidders in connection with the Bid Procedures and the Sale.

(3) **Bid Requirements:**

a. *Form of Agreement*. Potential Bidders intending to submit bids must include with their bids:

i. a statement that such Potential Bidder offers to purchase the Assets upon substantially the same terms as, or terms more favorable to the bankruptcy estate than, the terms set forth in the APA.

ii. a clean and duly executed purchase agreement (each, a "Transaction Agreement") and a marked copy of such agreement that reflects any variations from the APA;

iii. the purchase price to be paid by such Qualifying Bidder bid and identify the liabilities proposed to be paid or assumed by such Qualifying Bidder; and

iv. a statement that such Qualifying Bidder offers to purchase the Assets included in the APA upon substantially the same terms as, or terms more favorable to the bankruptcy estate than, the terms set forth in the APA.

b. *Qualifying Bid*. Other than in the case of the Buyer, to be deemed a "Qualifying Bid," a bid must be received from a Qualifying Bidder on or before the Final Bid Deadline and satisfy each of the following requirements:

i. be in writing;

ii. fully disclose the identity of the Qualifying Bidder and whether such party is an insider (as defined in section 101 of the Bankruptcy Code) of the Debtor, and provide the contact information of the specific person(s) whom the Trustee or his advisors should contact in the event that the Trustee has any questions or wishes to discuss the bid submitted by the Qualifying Bidder;

iii. set forth the purchase price to be paid by such Qualifying Bidder and identify the liabilities proposed to be paid or assumed by such Qualifying Bidder;

iv. state that such Qualifying Bidder offers to purchase those assets included in the APA upon substantially the same terms as, or terms more favorable to the bankruptcy estate than, the terms set forth in the APA;

v. be accompanied by a clean and marked modified Transaction Agreement that reflects any variations from the APA for the Assets;

vi. state that such Qualifying Bidder's offer is formal, binding and unconditional and is irrevocable until the conclusion of the Sale Hearing unless such party is the Successful Bidder or Back-Up Bidder in which case such offer is formal, binding and unconditional and is irrevocable until two (2) business days after the closing of the Sale of the Assets;

vii. state that such Qualifying Bidder is financially capable of consummating the transactions contemplated by its Transaction Agreement and provide written evidence in support thereof;

viii. contain such financial and other information to allow the Trustee to make a reasonable determination as to the Qualifying Bidder's financial and other capabilities to close the transactions contemplated by its proposed Transaction Agreement, including, without limitation, such financial and other information supporting the Qualifying Bidder's ability to comply with the requirements of adequate assurance of future performance under section 365(f)(2)(B) of the Bankruptcy Code, including the Qualifying Bidder's financial wherewithal and willingness to perform under any contracts that are assumed and assigned to the Qualifying Bidder, in a form that allows the Trustee to make available, within one (1) business day after such receipt, such information to any counterparties to any contracts or leases being assumed and assigned in connection with the Sale that have requested, in writing, such information;

ix. a commitment to close the Sale within 5 days after the order approving the Sale has become final;

x. not request or entitle such Qualifying Bidder (other than the Buyer) to any break-up fee, termination fee, expense reimbursement or similar type of fee or payment;

xi. the aggregate consideration proposed by the Qualifying Bidder (other than the Buyer) must equal or exceed the sum of the amount of (A) $400,0000 (the purchase price under the APA, plus (B) a break-up fee of $25,000 (the "Expense Reimbursement"[3], plus (C) $25,000 (collectively, the "Minimum Bid");

xii. not contain any contingencies of any kind, including, without limitation, contingencies related to financing, due diligence, or third party regulatory or internal approval;

xiii. contain written evidence satisfactory to the Trustee that the Qualifying Bidder has the ability to close the transactions contemplated by its Transaction Agreement with appropriate contact information to verify funds;

xiv. contain a written acknowledgement and representation that the Qualifying Bidder (i) has had an opportunity to conduct any and all due diligence regarding the Assets, (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and other information in making its Qualifying Bid, and (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any documents or other information provided in connection with the Bid Procedures and the Sale, and (iv) has not entered into any agreement with any other potential bidder concerning the Auction or the Sale or discloses any agreement with any other potential bidder concerning the Auction or Sale;

xv. provides for the Qualifying Bidder to serve as a backup bidder (the "Back-Up Bidder") if the Qualifying Bidder's bid is the next highest and best bid (the "Back-Up Bid") after the Successful Bid (as defined below), in accordance with the terms of the Transaction Agreement; and

xvi. provides a good faith cash deposit in the amount of $100,000 (the amount of the Good Faith Deposit made by the Buyer) by cashier's check payable to the Trustee on behalf of the bankruptcy estate.

A bid from a Qualifying Bidder satisfying all of the above requirements, as determined by the Trustee, shall constitute a Qualifying Bid. The Trustee reserves the right to work with any Qualifying Bidder in advance of the Auction to cure any deficiencies in a bid that is not initially deemed a Qualifying Bid.

Each Qualifying Bidder submitting a bid shall be deemed to: (a) acknowledge and represent that it is bound by all of the terms and conditions of the Bid Procedures; and (b) have waived the right to pursue a substantial contribution claim under section 503 of the Bankruptcy Code related in any way to the submission of its bid, the Bid Procedures, and the Sale.

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[3] The Expense Reimbursement reflects the value to the estate of Buyer acting as a "stalking horse" bidder, and recognizes that the Buyer has incurred substantial expenses and is expected to continue to incur additional costs through the hearing on this Motion.

c. *Final Bid Deadline*. A Qualifying Bidder, other than the Buyer, that desires to make a bid shall deliver a written and electronic copy of its bid in both PDF and MS-WORD format to the Trustee so as to be received on or before April 3, 2017 5:00 p.m. (PT) (the "Bid Deadline"); provided that the Trustee may extend the Bid Deadline without further order of the Court. Any party that does not submit a bid by the Bid Deadline will not be allowed to (a) submit any offer after the Bid Deadline, or (b) participate in the Auction.

(4) **Auction**: In the event that the Trustee timely receives one or more Qualifying Bids other than Buyer's Qualifying Bid, the Trustee shall conduct an auction at the Sale Hearing (the "Auction"). Following the Auction, the Trustee will determine which Qualifying Bid is the highest and best bid for the Assets, which will be determined by considering, among other things, the following non-binding factors: (a) the financial wherewithal to meet all requirements of the Sale; (b) variations between competing bids and any incremental execution risk that the Trustee reasonably determines exists as a result of those variations; (c) the time needed to close a Sale compared with other Qualifying Bids and the cost to the Debtor's bankruptcy estate of any incremental delay; (d) the total consideration to be received by the Trustee on behalf of the bankruptcy estate; (e) the ability to obtain a higher or better offer for Assets when sold individually or in combination with one or more of the Debtor's other assets; (f) the net benefit to the estate, taking into account the Buyer's rights to the Expense Reimbursement; (g) the impact on creditors; and (h) any other factors the Trustee may reasonably deem relevant.

The Auction shall be governed by the following procedures:

a. the Auction shall be held at the Sale Hearing on April 7, 2017 at 10:00 a.m. (ET) (the "Auction Date");

b. only the Buyer and the other Qualifying Bidders with Qualifying Bids (together, the "Auction Bidders") shall be entitled to make any subsequent bids at the Auction;

c. the Auction Bidders shall appear in person at the Auction, or through a duly authorized representative;

d. the Auction Bidders shall confirm that they have not engaged in any collusion with respect to the Bid Procedures, the Auction or the Sale;

e. bidding on the Assets shall commence at the amount of the Minimum Bid, and the Auction Bidders may submit successive bids in increments of at least $10,000, provided that: (i) each such successive bid must be a Qualifying Bid; (ii) if the then highest and best bid was made by the Buyer, such bid shall be deemed to include the sum of the amount of the Expense Reimbursement; (iii) any bid made by the Buyer, including in each and every round of bidding, shall be deemed to include the sum of the amount of the Expense Reimbursement in addition to the cash and other consideration provided for in its bid; and (iv) the Trustee shall retain the right to modify the bid increment requirements at the Auction;

f. the Auction may include individual negotiations with any of the Auction Bidders, but all bids shall be made on the record and in the presence of all of the Auction Bidders;

g. all material terms of the bid that is deemed to be the highest and best bid for each round of bidding shall be fully disclosed to the Auction Bidders, and the Trustee shall use reasonable efforts to clarify any and all questions that the Auction Bidders may have regarding the announcement of the then-current highest and best bid;

h. the Trustee and his professional advisors may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (*e.g.*, the amount of time allotted to make subsequent bids) for conducting the Auction, provided that such rules are (i) not inconsistent with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure and (ii) disclosed to the Auction Bidders;

i. each Auction Bidder shall (i) be deemed to have waived any right to a jury trial in connection with, and consented and submitted to the exclusive jurisdiction of the Court over, any actions or proceedings arising from or relating to the Bid Procedures, the Sale, the Auction and the construction and enforcement of the contemplated transaction documents of the Auction Bidders, (ii) bring any such action or proceeding in the Court, and (iii) be deemed to have consented to the Court entering a final judgment determining any such action or proceeding and that such final judgment in any such action or proceeding, including all appeals, shall be conclusive and may be enforced in other jurisdictions (including any foreign jurisdictions) by suit on the judgment or in any other manner provided by applicable law;

j. the Auction Bidders shall have the right to make additional modifications to their Transaction Agreement, in conjunction with each Qualifying Bid submitted in each round of bidding during the Auction, provided that (i) any such modifications on an aggregate basis and viewed in whole, shall not, in the Trustee's discretion, be less favorable to the bankruptcy estate than the terms of the APA, and (ii) each Qualifying Bid shall constitute an irrevocable offer and shall be binding on the Auction Bidder submitting such bid until such party shall have submitted a subsequent Qualifying Bid at the Auction or the conclusion of the Sale Hearing, whichever occurs sooner, unless such bid is selected as the Successful Bid or the Back-Up Bid, which shall remain binding as provided for in the Bid Procedures;

k. the Trustee shall have the right to request any additional financial information that will allow the Trustee to make a reasonable determination as to an Auction Bidder's financial and other capabilities to consummate the transactions contemplated by the applicable Transaction Agreement, as may be amended during the Auction, and any further information that the Trustee may believe is reasonably necessary to clarify and evaluate any bid made by an Auction Bidder during the Auction;

l. upon the conclusion of the Auction, the Trustee shall determine, subject to Court approval, the offer or offers for the Assets that is or are the highest and best from among the Qualifying Bids submitted at the Auction (the "Successful Bid"). The bidder submitting such Successful Bid shall become the "Successful Bidder," and shall have such rights and responsibilities of the purchaser as set forth in the applicable Transaction Agreement. The Trustee may, in his sole discretion, designate a Back-Up Bid or Bids (and the corresponding Back-Up Bidder or Bidders) to purchase the Assets in the event that a Successful Bidder does not close a Sale; and

m. at the Sale Hearing, the Successful Bidder shall complete and execute all agreements, contracts, instruments and other documents evidencing and containing the terms and conditions upon which the Successful Bid was made.

THE SUCCESSFUL BID AND ANY BACK-UP BID SHALL CONSTITUTE AN IRREVOCABLE OFFER AND BE BINDING ON THE SUCCESSFUL BIDDER AND THE BACK-UP BIDDER, RESPECTIVELY, FROM THE TIME THE BID IS SUBMITTED UNTIL THE TIME PERIOD SPECIFIED HEREIN. EACH QUALIFYING BID THAT IS NOT THE SUCCESSFUL BID OR THE BACK-UP BID SHALL BE DEEMED WITHDRAWN AND TERMINATED AT THE CONCLUSION OF THE SALE HEARING

(5) **Sale Hearing**: If an Auction is held, the Successful Bid and any Back-Up for the Assets will be subject to approval by the Court at the Sale Hearing.

(6) **Backup Bidder**: Notwithstanding any of the foregoing, in the event that a Successful Bidder fails to close the applicable Sale within five (5) days after the an order approving of the Successful Bid has become final (or such date as may be extended by the Trustee), the Back-Up Bid for the Sale will be deemed to be the Successful Bid, the Back-Up Bidder will be deemed to be the Successful Bidder, and the Trustee will be authorized, but not directed, to immediately close that Sale to the Back-Up Bidder subject to the terms of the Back-Up Bid without the need for further order of the Court and without the need for further notice to any interested parties.

(7) **Return of Deposits**: All Deposits shall be returned to each bidder not selected by the Trustee as the Successful Bidder or Back-Up Bidders for the Sale no later than three (3) business days following the Sale Hearing. The deposit of a Back-Up Bidder shall be returned within three (3) business days of the closing of the Sale to the Successful Bidder; the deposit of the Successful Bidder or, if the Sale is closed with the Back-Up Bidder, the deposit of the Back-Up Bidder, shall be applied to the purchase price for the Sale. If the Successful Bidder (or, if the Sale is to be closed with the Back-Up Bidder, then the Back-Up Bidder) fails to consummate the Sale because of a breach or failure to perform on the part of such bidder, then, subject to the terms of the applicable Transaction Agreement, the Trustee on behalf of the bankruptcy estate shall be entitled to retain the Deposit of the Successful Bidder (or, if the Sale is to be closed with the Back-Up Bidder, then the Back-Up Bidder) as part of the damages resulting to the estate for such breach or failure to perform.

(8) **Reservation of Rights**. Notwithstanding any of the foregoing, the Trustee reserves the right to modify these Bid Procedures at or prior to the Auction, including, without limitation, to extend the deadlines set forth herein, allow for bidding on only a portion of the Assets and not all of them, modify bidding increments, waive terms and conditions set forth herein with respect to any or all potential bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions

with respect to any or all Potential Bidders, adjourn or cancel the Auction at or prior to the Auction, and adjourn or cancel the Sale Hearing. Additionally, the Trustee has the right to terminate the sale and auction process with respect to any or all of the Assets at any time.